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of the salvage compensation to which he was otherwise entitled for his prior service.

I do not think that, under the peculiar circumstances of the case, an absolute forfeiture of the whole amount was incurred retroactively by his assumption and exercise of the illegitimate authority. But the effect of this usurpation must necessarily be to reduce very materially the amount which would otherwise be awardable to him.

What the reduced amount ought to be is not easily determinable. I have hesitated between three thousand and four thousand dollars, and have determined on the greater sum partly because I think that the defendants' letter of thanks almost invited the litigation which has followed, and though not so intended, must have induced a high estimate by the libellant of the value of the service.

Costs are adjudged to the libellant; but under the head of depositions, taxable costs will not be allowed to an amount exceeding two hundred dollars. The testimony is of great bulk, but of no proportionate weight; and its excess in bulk ought not to be allowed to swell the costs.

Decree for libellant for four thousand dollars, provided that, under the head of depositions, costs exceeding two hundred dollars will not be taxed or allowed.

Court of Appeals of Maryland.

PITTSBURGH & CONNELLSVILLE RAILROAD CO. *v.* ANDREWS.

It is such negligence for a passenger in a railroad car to allow his arm to project out of the window, that if it is injured by coming in contact with any external object he cannot recover, notwithstanding the injury may have been partly caused by the negligence of the company in permitting an obstacle to be too near the track.

Where a witness is asked on cross-examination if he had a certain conversation with a person named and denies it, the deposition of the person with whom the alleged conversation took place is admissible to impeach the witness, notwithstanding it was taken under a commission at the execution of which the witness sought to be impeached was not examined.

THIS was an action brought by the appellee to recover damages for injuries received while being carried as a passenger over the appellant's railroad on the 18th of July 1872. He purchased a ticket from McKeesport to Cumberland, and when injured was

sitting in the second car from the engine. The train left Connellsville between ten and eleven o'clock at night, and when about half a mile from that station, while going at less than half speed, struck a freight-car which was left standing on a siding, in a position so near to the switch as not to permit the passage of the train without striking it. The locomotive struck the end of the freight-car, knocked it aside, and the train passed without any other collision, except a slight scratch to the sleeping-car, which was about nine inches wider than the others. No one was hurt except the plaintiff, whose right arm was broken in several places and permanently injured. The car in which he was riding did not come in contact with the freight-car, and it was admitted his arm at the time was out of the window. He was a man of mature years, and he would have received no injury if his arm had not been in this position. As to how it came to be thus protruded, the testimony was conflicting. The plaintiff testified that he was sitting with his elbow inside of the car on the window-sill, and the jar pitched him forward, and in attempting to catch himself his arm went out of the window and was caught between the two cars; that the window was up when he entered the car; that he did not lie with elbow out of the window or lay his head on his arm; was not asleep at the time, and did not recollect that the conductor came to him when taking up tickets, and cautioned him it was dangerous to lie in that manner, or pulled him out of the window. On the other hand, the testimony of the conductor and of a fellow-passenger in the same car was to the effect that a few minutes before the accident, when the conductor came through the car taking up tickets, the plaintiff was lying in his seat with his arm out of the window, and his head resting on his arm, that the conductor took hold of him, shook him and pulled him out of the window, and told him to take his head in or he would get it knocked off; that his elbow must from his position at the time of the accident have extended out over the window-sill, and the jar was so slight that it could not have thrown his arm out of the window.

The opinion of the court was delivered by

MILLER, J.—The appellant insists the jury should have been instructed that if they found the accident occurred as stated by the witnesses for the defence, then there was such want of ordinary care and prudence on the part of the plaintiff, directly contributing

to the injury, as to prevent a recovery, notwithstanding the negligence of the defendant, and several prayers were presented to that effect, which were refused. Whether such an instruction ought to have been given, is the main question in the case.

The general rule is that negligence is a question for the jury to decide upon all the facts and circumstances of each case, but while this is the general rule, cases may and sometimes do occur where the court is required to declare some plain act of carelessness on the plaintiff's part to be in law such contributing negligence as will prevent a recovery, or on the other hand, where there is no proof of negligence on the part of the defendant, or where such proof is so slight and inconclusive in its nature, as to demand from the court an instruction, as to its legal insufficiency to prove negligence in order to prevent the jury from indulging in wild speculation or irrational conjecture: *Shipley's Case*, 31 Md. 270. The power of the court thus to interpose has been uniformly asserted by the Appellate Court of this state as well as by the courts of England and of our sister states, though instances calling for its exertion are comparatively rare. We have sustained its exercise in the two recent cases of *The Baltimore City Passenger Railway Co.* v. *Wilkinson*, 30 Md. 224, and *Lewis* v. *The Baltimore & Ohio Railroad Co.*, decided at our last term, *ante*, p. 284.

Among the numerous accidents that have occurred on railways there have been many cases identical or nearly so with the present, and the very question it is our duty now to determine has arisen, and been decided by the courts of last resort in other states. The first is that of the *New Jersey Railroad Co.* v. *Kennard*, 9 Harris 203, decided in 1853. In that case C. J. GIBSON, at *nisi prius*, in his charge to the jury, said, "A carrier of either goods or passengers is bound to provide a carriage or vehicle perfect in all its parts, in default of which he becomes responsible for any loss or injury that may be suffered, provided it happen without negligence or misconduct on the part of the party injured. A carrier of passengers is bound to omit no precaution that may conduce to their safety. He is bound to guard beforehand against every apparent danger that may beset them. The danger incident to travelling in railway cars are few in comparison with those incident to other modes of travel: but among the most prominent of them is risk of injury to limbs stuck out of the windows where the cars are not so constructed as to prevent it. Any one who has travelled by rail-

way must have observed that even the most careful passengers forget the risk, and unconsciously suffer their elbows to slip out beyond the window-sill. What can the carrier do to prevent this? No more is required than a few metallic rods set in the window perpendicularly or horizontally, or a netting of wirework, or even wooden slats. None of these would materially impede the circulation of air or abridge the comfort of the passengers, while it would make their safety sure. A car without any of these appliances is, to coin a phrase, not *roadworthy*, and a carrier is responsible for any loss that may happen from that cause alone. It is a notorious custom in railway cars, and it is proved to be so by the evidence in the cause, for passengers next to the windows to rest their elbows on the sills of them, and carriers are bound to take notice of the customs and habitudes of railway passengers, and to provide for them. If a passenger therefore sits and rides in a car as others generally do, and receives injury from an imperfect construction of it, the carrier is liable for it."

He then told the jury he would leave it for them to say whether the resting of his arm on the window-sill with his elbow outside of it was contributing negligence on the part of the plaintiff. That charge was affirmed by the Supreme Court in a short *per curiam* opinion, with the reservation that the language of the learned judge seems to be too broad as a general principle, where he says that no car is good if the windows are not so constructed as to prevent passengers from putting their limbs through them; but in its application to a road which in some places is so narrow as to endanger projecting limbs, as here, the instruction is proper.

In *Holbrook* v. *The Utica & Schenectady Railroad Co.*, 12 New York 236, decided in 1855, the judge at the trial was requested by the defendant's counsel to charge the jury as matter of law, that if they found that the plaintiff's arm or elbow was outside of the window of the car when the injury was received it was an act of negligence, and she could not recover, but he refused to charge on that subject further than he had already done. In the Court of Appeals the opinion was delivered by RUGGLES, J., who, on that question, says: "In this refusal to charge as requested, I was at first inclined to think there was error, but my brethren are unanimously of opinion that the judge had already charged the jury *substantially in conformity with the request*, and that he was right therefore in declining to *repeat what he had before stated.* I yield

to their judgment and concur in affirming the judgment." From this it is clear the court was unanimous in opinion that the law of the requested charge was correct.

Next in order of time is the case of *Todd* v. *Old Colony & Fall River Railroad Co.*, 3 Allen 18, decided in 1861, in which the Supreme Court of Massachusetts reversed an instruction which left the question of negligence to the jury, and say: "If the plaintiff was riding in the car with his elbow or arm projecting out of the window, by reason of which he sustained an injury, he was guilty of a want of due care which would prevent him from maintaining his action. Looking at the mode in which railroads are constructed, with posts and barriers which are placed very near to the track on which the cars are to pass, the rapid rate at which trains move, the manner in which cars are made with seats to accommodate passengers so as to avoid any exposure of the body or limbs to outward objects in passing, we can see no ground on which it can be contended that a person travelling on a railroad is exercising reasonable care in placing his arm in such a position that it protrudes from a window, and may come in contact with external obstructions; certainly if it is a want of due care to attempt to leave a car when the train is in motion, although going at a slow rate of speed, as has been heretofore determined by this court, it is no less a want of proper care to ride in a car with an arm or leg exposed to collision against passing trains, or the necessary structures on the side of the track. Nor was it the province of the jury to determine as a matter of fact whether the plaintiff used due and reasonable care, if it was proved that his arm or a portion of it was outside of the window at the time of the accident. If there was no dispute or controversy about this fact, and the position of his arm was the cause of or contributed to the accident, the plaintiff failed to prove an essential element to the maintenance of his action. In such a state of the evidence it was the duty of the court to decide on its legal effect, and to say to the jury, the plaintiff had failed to make out his case." When the same case again came before the court in 7 Allen 207, the former decision was reaffirmed, and most emphatically as to the power and duty of the court in such cases to pronounce upon the legal effect of admitted facts.

Next is the case of *The Pittsburgh & Connellsville Railroad Co.*

v. McClurg, 7 Am. Law Reg. N. S. 277, decided in 1867. The plaintiff in that case suffered his elbow to project from the window, and it was broken by coming in contact with a car standing on a switch. At the trial the judge, following the ruling in *Kennard's Case*, instructed the jury that a passenger on a railway car who has unconsciously suffered his elbow to slip out beyond the window-sill is not necessarily guilty of negligence, and submitted it to them as a question of fact whether under all the circumstances of the case, the plaintiff in permitting his arm or elbow so to project was or was not guilty of negligence. This ruling being assigned for error, the Supreme Court carefully considered the question. Their opinion was delivered by C. J. THOMPSON, who says, "We must regard the remark, 'unconsciously suffered his elbow to slip beyond the window-sill,' to mean inattentively. In that sense it was negligently suffered to slip. Of course this was negligence *in se*, unless he was under no obligation to take care of himself. But no case asserts that, and every case the contrary. Out of the omission to do so springs the doctrine of contributory negligence, which defeats a plaintiff, and which is so firmly established as a principle of law, that nobody dreams of doubting it. We have then the case broadly, I think, that negligence is not to be inferred, when injury accrues from an exposure of an elbow, or an arm, out of a car-window, if it be not wilfully done. This cannot be maintained on any reasonable principle, we think. When a passenger on a railroad purchases his ticket, it entitles him to a seat in the cars. In the seat no part of his body is exposed to obstacles outside of the car. He is secure there ordinarily, from any contact with them. Where he is thus provided with a seat, safe and secure in the absence of accident to the train, and the carrier has a safe and convenient car, well conducted, and skilfully managed, his duty is performed towards the passenger. The duty of the latter on entering, arises namely, that he will conform to all the reasonable rules and regulations of the company, for occupying, using and leaving the cars, and after doing so, if injury befall him by the negligence of the carriers, they must answer; if he do not so conform, but is guilty of negligence therein, and is injured, although there may be negligence on the part of the carriers, he cannot recover." Reference is then made to several authorities in support of this position, and among others to *Penna. Railroad Co. v. Zebe & Wife*, 9 Casey 318, where it was held the company's

liability could not be fixed for any injury consequent on a choice of the passenger, in disregard of the provisions made by it for his safety; that it was error to submit the question of the right of the parties to leave the cars at either side to the jury, in the absence of proof of justifying necessity for so doing; that it was not negligence on the part of the company that they did not by force of barriers prevent the parties from leaving at the wrong side; that people are not to be treated as cattle; they are presumed to act reasonably in all given contingencies, and the company had no reason to expect anything else in that case. The opinion then proceeds: "A passenger on entering a railroad-car is to be presumed to know the use of a seat, and the use of a window; that the former is to sit in, and the latter is to admit light and air. Each has its separate use. The seat he may occupy in any way most comfortable to himself. The window he has a right to enjoy, but not to occupy. Its use is for the benefit of all, not for the comfort alone of him, who has by accident got nearest it. If therefore he sit with his elbow in it, he does so without authority, and if he allow it to protrude out, and is injured, is this due care on his part? He was not put there by the carrier, nor invited to go there, nor misled in regard to the fact, that it is not a part of his seat, nor that its purposes were not exclusively to admit light and air for the benefit of all. His position is therefore without authority. His negligence consists in putting his limbs where they ought not to be, and liable to be broken, without his ability to know whether there is danger or not approaching. In a case, therefore, where the injury stands confessed, or is proved to have resulted from the position voluntarily or thoughtlessly taken in a window, by contact with outside obstacles or forces, it cannot be otherwise characterized than as negligence, and so to be pronounced by the court," and further: "In the absence of some justifying necessity or incapacity to take care of himself on the part of the passenger, no one can doubt, I think, from the reason of the thing, in view of the nature of the vehicle used, being a railroad car, that to extend an arm or a hand beyond the window-sill is dangerous, and is recklessness or negligence. Whenever the facts present such a case singly, and without any controlling or justifying necessity, we think the court ought to declare the act negligence; and as there was nothing like this shown in the case before us, we think the court ought not to have affirmed the plaintiff's point. Uncon-

sciously exposing himself did not help the plaintiff's case, as it was not shown that his unconsciousness was not the result of the want of prudent attention to his situation on the part of the plaintiff. It would be a novel answer to the allegation of negligence, to allege that the plaintiff had slept in the position he was in when hurt, and that would be a condition of unconsciousness. Sleeping when due care would require one to be awake, or in dangerous circumstances, is negligence, and no answer to the company can be given to such act. Of course these views are predicated of a case in which there are no facts to qualify or justify the act. It is possible that a state of facts might be found to show an exception to the rule, and where that occurs the rule ceases. But none such appear as this case is presented." The court then proceed to examine *Kennard's Case*, and deliberately overrule it, as well as the charge of C. J. GIBSON therein; and great as is our respect and admiration for the learning and ability of that distinguished jurist, we yet think, the weight of reason and authority is with the decision which has overruled his judgment on this question.

The plain doctrine of *McClurg's Case*, is that if a sane person of mature years, while a passenger in a railroad car, without any controlling or justifying necessity or cause for so doing, voluntarily or inattentively protrudes his elbow or arm from the window and it is injured by coming in contact with any external obstacle or force, it is such a clear act of contributory negligence on his part as will prevent a recovery, and that it is the duty of the court so to instruct the jury, as matter of law, notwithstanding the negligence of the company in permitting the obstacle to be placed too near the track of the passing train.

About the same time the Supreme Court of Indiana decided precisely in the same way, in a case involving the same question: *Indianapolis & Cincinnati Railroad Co.* v. *Rutherford*, 7 Am. Law Reg. N. S. 476, and following these is a decision to the same effect by the Court of Appeals of Kentucky: *Louisville & Nashville Railroad Co.* v. *Sickings*, 5 Bush 1. These decisions are approved by Judge REDFIELD in his note to *McClurg's Case*, in 2 American Railway Cases 552, where he says, "we can entertain no possible question that these later cases are entirely sound, and that *Kennard's Case* was decided upon mistaken grounds," and adds, "the rule is without exception in all the well considered cases, that the plaintiff cannot recover for any damage he may

sustain where his own want of ordinary care contributed directly towards it, however great or extreme may have been the negligence on the part of the defendant."

Opposed to these authorities, there are besides *Kennard's Case*, the two cases of *Spencer* v. *Milwaukee & Prairie du Chien Railroad Co.*, 17 Wisconsin 487, and *Chicago & Alton Railroad Co.* v. *Pondrom*, 51 Illinois 333. The former is directly in point, and presents the opposing views very forcibly. In the latter the decision, as we understand it, was actually rested upon a principle of law established in that state, that where there has been contributing negligence, the negligence of both parties must be *compared*, and if the plaintiff is guilty of negligence which is slight as compared with that of the defendant, he may recover. Such a principle has never been sanctioned in this state, but the exact contrary is the settled rule here (*Geis's Case*, 41 Md. 366), and the Illinois court admits the doctrine is not supported by the weight of authority elsewhere. They refer however to *Kennard's Case*, and to *McClurg's Case*, and think the former the better considered of the two, based on sounder reasons, more in harmony with the analogies of the law, and entitled to more weight. With great respect for the judgments of that learned tribunal, we entertain, and have expressed, a different opinion; we think the latter is better reasoned, as well as supported by the decided preponderance of authority, and have no hesitation in accepting it, with the other cases to the same effect, as containing a correct exposition of the law on this subject.

In our review and citations from the decisions upon this question (which have been more extended than usual, or perhaps than is necessary), we have noticed those only which are exactly or nearly identical with the case before us, and have refrained from making any reference to a large number of others, both in this country and in England, where in similar and analogous cases, the courts have interposed, and either withdrawn them from the jury, or given to the jury imperative construction as to the legal effect of facts admitted, or to be found by them.

It follows there was error in the refusal to grant several of the defendant's prayers, and especially the third, seventh and eighth, as well as in the first instruction given by the court on its own motion. Upon the assumption the jury would find the facts therein hypothetically stated, these prayers of the defendant, though appa-

rently more numerous than the exigencies of the case required, embody each a correct legal proposition. It must be observed however that while it is admitted the plaintiff's arm was out of the window at the time of the accident, there is a conflict of testimony, as to how it came to be thus exposed, whether as stated by the plaintiff, or by the witnesses for the defence. This question of fact it is the undoubted province of the jury to determine, and upon the weight of evidence in this respect, it is not our province to express any opinion. The jury therefore having the unquestioned right to give credit to the testimony of the plaintiff, and reject that for the defence, there was no error in rejecting the defendant's first and second prayers. The ninth and tenth prayers need not be critically examined. If they were intended to assert the same proposition contained in the third, seventh and eighth, they were wholly unnecessary; and if their purpose was to announce any legal proposition different from that which we have in this opinion declared, and adopted, then there was no error in rejecting them. We find no error in the rejection of the eleventh prayer. All the law to which the company was entitled upon the theory of the case which this prayer contemplates, is contained in their sixth prayer, which was granted. Their fourth and fifth prayers proceed upon the assumption the jury were to determine the question of contributory negligence, and in that view of the case, the same law was embodied in the first instruction of the court. It does not follow there was error in the rejection of these prayers, because we have said there was error in this instruction, inasmuch as both assumed the same theory of the case. Upon that theory the court's instruction gave the company the benefit of the same law sought by these prayers. No objection was made in argument to the court's second instruction, on the question of damages, and we do not understand the exception as extending to this ruling. But if it does, there is no error in it. The measure of damages is therein correctly defined according to numerous decisions of this court on that subject.

The plaintiff's first prayer states the law as announced in *Stokes* v. *Saltonstall*, 13 Pet. 181, *Stockton* v. *Frey*, 4 Gill 406, and *Worthington's Case*, 21 Md. 275, about which there can in this state at least be no doubt, viz.: that the occurrence of an accident and injury to a passenger is *primâ facie* evidence of negligence in the carrier, and throws upon him the *onus* of rebutting the pre-

sumption by proving there was no negligence on his part. But in those cases there was no proof, and no question of contributory negligence in the plaintiff. The courts in those cases were not dealing with a case like this, in which the right of the recovery is affected by, and dependent upon, the presence or absence of such negligence. In this case it was error to instruct the jury that the plaintiff is *entitled to recover* upon proof of the injury, unless the company showed such injury did not result from their negligence, without noticing or instructing them as to the effect of contributory negligence on his part. No doubt the court intended the last clause of its first instruction as a modification of this prayer, but as the two stand, and upon the assumption there was no error in that given by the court, there seems to be a plain inconsistency between them well calculated to confuse and mislead the jury.

The only remaining question in the case, is that presented by the first exception. The plaintiff when under cross-examination as a witness, was asked "did you or not, on the morning after the accident, have a conversation with David Welsh in front of the Yough House, in which you said, you must have been lying with your arm out of the window, and something struck it, and that was all you knew?" to which witness replied, "he did not know Welsh, and had no such conversation." He was then asked "if he had on the morning after the accident in Connellsville any conversation with any one, in which he said that he must have been lying with his arm out of the window, and something struck it, and that was all he knew?" to which he replied "he had no such conversation with any one." The defendant then, for the purpose of impeaching the plaintiff as a witness, offered a part of the testimony of Welsh, which had been taken and returned under a foreign commission, in which he says in answer to an interrogatory whether he had any conversation with the plaintiff about his injury, and if so, state what that conversation was? "I had a conversation with the plaintiff about his injury; he was brought to my house, and I asked him how he got his arm hurt; he said he must have been lying with his arm out of the window, and something struck it, and that was all he knew, until he came to himself." Objection was made to the offer of this testimony for the purpose of impeaching the plaintiff as a witness, which the court sustained, but admitted the testimony as a declaration of the plain-

tiff as to the manner in which the injury occurred. To this ruling the defendant excepted.

A majority of the court are of the opinion, there was a sufficient foundation laid for the introduction of impeaching testimony, and that the defendant had the right to use testimony of Welsh for that purpose, notwithstanding it was taken under a commission at the execution of which the witness sought to be impeached was not examined.

Judgment reversed, and new trial awarded.

Supreme Court of Ohio.

JOHN SWASEY ET AL. *v.* M. T. ANTRAM ET AL.

Where one of the defendants, in an action on a joint contract, dies before judgment, and the judgment is taken against all the defendants, without any suggestion of his death, or making his representatives parties, such judgment is not void, but merely voidable, and is a determination of the action, within the meaning of sections 218 and 219 of the code, authorizing an action by the plaintiff in attachment against the garnishee.

A married woman has not capacity to enter into a general mercantile partnership not connected with or relating to her separate property, and where she assumes to do so with the consent of her husband, and is by him assisted in managing and carrying on the business, the husband, and not the wife, is to be regarded in law as the partner.

A *feme covert* having obtained a "permit" to trade within the lines of the army, with the knowledge and consent of her husband entered into a partnership with other persons, for the purpose of buying and selling goods and merchandise under said "permit," and herself, with the assistance of her husband, managed and conducted the business. The firm was subsequently dissolved, and its property transferred by the other partners to her, she agreeing to pay all the partnership debts. She then sold the property to S., who had notice of all the facts, and who in like manner agreed to pay the partnership debts. This was all done with the knowledge and concurrence of the husband, who joined her in executing the bill of sale to S. In an action by a creditor of the firm against the *husband* and the other members of the firm, not including the wife: *Held*, that the goods in the hands of S., or the price agreed by him to be paid therefor, and not yet paid, are liable to attachment in the action.

ERROR to the Superior Court of Cincinnati.

Antram & Co. brought an action against Hazard L. Baldwin and three other named persons, to recover the price of goods alleged to have been sold by Antram & Co. to the defendants, while the latter were doing business as partners under the name of M. J. Baldwin & Co. The suit was commenced by a writ of attachment,